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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-705

ANTHONY BARON,
Petitioner,

vs.

CLARE BARON,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE COURT OF APPEALS, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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IN THE

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TOPICAL INDEX

	Page
Table of Authorities	ii
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
FEDERAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
PETITIONER'S ARGUMENT	6
THE EIGHTH AMENDMENT AS A PROTECTION AGAINST PUNISHMENT WHICH OFFENDS CONTEMPORARY STANDARDS OF DECENCY	9
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	12
EXHIBIT A - Opinion Court of Appeal Filed May 10, 1973	
EXHIBIT B - Notice of Denial Writ of Certiorari	
EXHIBIT C - Notice of Transfer in Above Action	

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Nosser (1971) 438 F.2d 183	9
Hancock v. Avery (1969) 301 F. Supp. 786	7, 10
Jackson v. Bishop (1967) 268 F. Supp. 804	7, 8
Kasper v. Brittain (1957) 245 F.2d 92	8
Lollis v. New York State Department of Social Services (1970) 322 F. Supp. 473	8
Rhem v. McGrath (1971) 326 F. Supp. 681	7
Willoughby v. Phend (1969) 301 F. Supp. 644	10
Constitution	
United States Constitution:	
Eighth Amendment	4
Constitution Amendment, 6-12 U.S.C.A. 758	4
Statutes	
28 U.S.C. §1257(3)	2

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Petitioner ANTHONY BARON respectfully prays that a Writ of Certiorari to review the judgments and opinions of the Court of Appeals of the State of California, Second Appellate District, entered in this proceeding on July 31, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the California Supreme Court.

The judgment of the Court of Appeals of the State of California, Second Appellate District, was entered on May 15, 1973. A timely Petition for Writ of Certiorari in the California Supreme Court was filed and the same was transferred to the Court of Appeals of the State of California, Second Appellate District, on July 19, 1973. The Petition for Writ of Certiorari was thereafter denied by the Court of Appeals in the State of California, Second Appellate District on July 31, 1973. Notice of Denial of Petition is attached hereto.

JURISDICTION

Petitioner requests review under Title 28, Section 1257, Subsection 3 of the United States Code.

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: '(3) By Writ of Certiorari where the validity of the treaty or statute is drawn in question, or where the validity of the state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes or commission held or authority exercised under the United States.'"

QUESTIONS PRESENTED

Whether the deprivation of the right to reasonable visitation may be terminated by the Court where such order of termination has the practical effect of being punishment for contempt.

FEDERAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Constitution Amendment 6-12 U.S.C.A. 758.

STATEMENT OF THE CASE

Petitioner ANTHONY BARON and Respondent CLARE BARON were married on December 30, 1967 and separated on March 15, 1970. Interlocutory Judgment of Dissolution of Marriage was entered on or about June 14, 1971. Petitioner at that time was granted reasonable rights of visitation with the minor child JOHNATHAN BARON, which visitation rights provided for one day per month visitation for ANTHONY BARON with custody and control of the minor child being retained by CLARE BARON. On August 25, 1972, Petitioner ANTHONY BARON filed an Order to Show Cause in Re Modification of the visitation provisions of the

Interlocutory Judgment of Dissolution of Marriage and on December 30, 1972, Respondent CLARE BARON filed her Order to Show Cause in Re Modification of Child Visitation provisions. Concurrently with Respondent's Order to Show Cause in Re Modification of Visitation, the Respondent also filed an Order to Show Cause in Re Contempt. CLARE BARON's contention to support her Order to Show Cause in Re Modification was that ANTHONY BARON was not interested in his child and made no effort to gain his love, affection and confidence. At the time of trial on the hearing of the three Orders to Show Cause, testimony was taken to the effect that Petitioner did in fact visit with the minor child JOHNATHAN and exercised what limited visitation rights he then had. The Court also received evidence in the way of testimony regarding certain articles of property which were to have been transferred to CLARE BARON from Petitioner ANTHONY BARON pursuant to the original Interlocutory Judgment of Dissolution of Marriage. By Court order of April 11, 1972, Petitioner was found to be in contempt and was fined the sum of Three Thousand Five Hundred Dollars ($3,500.00) to be paid in equal

monthly installments of One Hundred Seventy-Five Dollars ($175.00) per month and Petitioner was placed on summary probation for the period of three years. Further, the Court terminated all rights of visitation which Petitioner had with the child JOHNATHAN.

PETITIONER'S ARGUMENT

Petitioner ANTHONY BARON prays review of the Order on the basis that a total deprivation of child visitation rights under these circumstances constitutes cruel and unusual punishment by depriving a father of the comfort and society of his son on the pretext of punishing the father for contempt for which he was also placed on summary probation for three years and required to pay a total sum of Three Thousand Five Hundred Dollars ($3,500.00). Contempt being a criminal punishment, the Petitioner's rights under the Constitution of the United States have been invaded and clearly, in the present situation, the refusal to permit a father the comfort and society of his son as a punishment for

contempt where Petitioner is also sentenced to probation and fine for the said contemptuous conduct must constitute cruel and unusual punishment.

Petitioner, conceding the allegations of contempt, has been cruelly and unusually punished by the refusal of the Court to permit any visitation with his son.

The Courts have held that cruel and unusual punishment is flexible and that it draws its meaning from evolving standards of decency that mark the progress of the maturing society. Rhem v. McGrath (1971) 326 F. Supp. 681. The concept of cruel and unusual punishment is one of wide applications, capable of acquiring new depths of meaning to conform with more enlightened concepts of criminal justice. Hancock v. Avery (1969) 301 F. Supp. 786. Petitioner does not contend that the Court lacks the power to issue an order terminating his right to visitation but where such an order has the practical effect and was in fact intended as punishment, constitutional protections may become involved and shield the party from what would otherwise be a legitimate act of the Court. In Jackson v. Bishop

(1967) 268 F. Supp. 804, it was held that punishment may be constitutional in its bare form and yet be unconstitutionally administered. Such is the case as the situation at Bar and in fact that courts have taken the position that where the punishment is disproportionate to the crime so as to be arbitrary and shocking to the sense of justice it may fall within the scope of the Eighth Amendment. Kasper v. Brittain (1957) 245 F.2d 92.

The test in determining whether or not punishment is so disproportionate to the offense that it is precluded under the Eighth Amendment is by judging the severity and harshness of the sanction as measured by broad concepts of dignity, humanity and decency against the act for which the party is being punished. Lollis v. New York State Department of Social Services (1970) 322 F. Supp. 473. While it has been held that this Amendment becomes applicable to a case only if punishment was grossly disproportionate to the offense, it is the Petitioner's contention that the Order of Court sought to be reviewed was so disproportionate and in fact the deprivation of visitation privileges under the context

and circumstances in this case and when imposed as additional penalty over summary probation and required restitution is violative of the Eighth Amendment protections against cruel and unusual punishment.

THE EIGHTH AMENDMENT AS A PROTECTION AGAINST PUNISHMENT WHICH OFFENDS CONTEMPORARY STANDARDS OF DECENCY

This shield offered by the Eighth Amendment against cruel and unusual punishment is not so rigidly defined as to be incapable of modern interpretation. (As stated in Anderson v. Nosser (1971) 438 F.2d 183.) The cruel and unusual punishment clause of this amendment is a non-static moral precept, designed to curb treatment which offends contemporary standards of decency. Clearly, the deprivation of parental companionship and society, both to the child as well as to the parent, is a severe and harsh penalty and one which should not be inflicted absent circumstances tending to show some great detriment to the child by reason of such parent-child contacts. This is not the situation in the case presented to this Court. The Petitioner ANTHONY

BARON is a loving father who desires to create a firm father-son relationship. It has long been the policy behind the law that where punishment is unusual or disproportionate to the offense so as to shock the public conscience, it is prohibited by the precepts of the Eighth Amendment. Willoughby v. Phend (1969) 301 F. Supp. 644. As stated in Hancock v. Avery, supra, the test for determination of whether cruel and unusual punishment is present in a given case are (1) whether under all the circumstances the punishment is of such a character as to shock general conscience or to be intolerable in fundamental fairness; such a judgment should be made in light of developing concepts of elemental decency and (2) if the punishment goes beyond what is necessary to achieve that aim, that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used. Petitioner presents to this Court a situation where the punishment clearly does not fit the crime and that moral decency and fundamental fairness dictate that a father not be deprived of a meaningful relationship with his son by reason of

minor contemptuous conduct for which conduct the Petitioner has been sentenced to three years' summary probation and has been ordered to make restitution in the sum of Three Thousand Five Hundred Dollars ($3,500.00).

REASONS FOR GRANTING THE WRIT

Petitioner prays that this Honorable Court will issue its Writ of Certiorari and review the record of the case in order that a determination may be had regarding the trial Court's power to sever the parental relationship as a punishment for minor violations of an Interlocutory Judgment of Dissolution of Marriage.

CONCLUSION

Under the circumstances of this case the trial Court's absolute termination of visitation rights in conjunction with other punishment rendered the Petitioner constitutes cruel and unusual punishment in violation of the Petitioner's rights and protections under the Eighth Amendment of the United States Constitution.

Respectfully submitted,

Law Offices of
MARVIN M. MITCHELSON and
DONALD N. WOLDMAN

By: MARVIN M. MITCHELSON

Attorneys for Petitioner
Anthony Baron

[redacted] A

EXHIBIT A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RECEIVED
MAY 17 1963

CLARE BARON,
Petitioner and Respondent,
vs.
ANTHONY BARON,
Respondent and Appellant.

Civil No. 40578
S.Ct. No. WED 10399

Appeal from judgment of the Superior Court of Los Angeles County. Coscoe Farley, Judge Presiding. Affirmed.

For Appellant: Marvin M. Mitchelson, by Donald M. Woldman;

For Respondent: Edward M. Raskin, Gerald E. Lichtig, John A. Ellis.

Appellant, Anthony Baron (Husband), and respondent, Clare Baron (Wife), were married in 1967 and adopted a minor child, Jonathan David Baron (Jonathan), in 1968. On May 12, 1970, Wife filed a Petition for Dissolution of Marriage. On June 15, 1971, the court entered an Interlocutory Judgment of Dissolution of Marriage (Interlocutory Judgment), which provided in relevant part:

"2. Petitioner [Wife] is awarded the care, custody and control of the minor child of the parties, JONATHAN DAVID BARON, born July 18, 1968, subject to the limited rights of Respondent [Husband] to visit with the minor child on one Sunday afternoon of each month, commencing with the second Sunday in June of 1971 from 1:00 P.M. to 6:00 P.M. and each second Sunday in June of 1971 from 1:00 P.M. to 6:00 P.M., and each second Sunday of each month thereafter from 1:00 P.M. to 6:00 P.M. In order to exercise said right of visitation, Respondent shall pick up said child at Petitioner's home at 1:00 P.M. and return said child to Petitioner's home at 6:00 P.M. If Respondent intends not to exercise his right of visitation on any particular second Sunday of each month, then he shall give forty-eight (48) hours notice thereof to Petitioner.

An appeal from an interlocutory decree of divorce (Civil No. 39980) was decided by this Court on 3/15/73. The record on that appeal reveals the following background:

Wife, who had been married twice and had two children, was about 50 years old at the time she married Husband, a part-time actor and male model, who was about 15 years her junior, and who divorced his second wife to marry her. The record does not indicate that Husband has or ever had any children. Jonathan, a new-born infant, was adopted by the parties in the first year of their marriage. Wife established a trust fund for the child. The interlocutory decree granted the divorce and custody to Wife and settled the property rights of the parties. On appeal Husband contested the custody of Jonathan and requested extended rights of visitation. He also contended: 1) approximately $100,000 Wife had transferred to him before and during their two and a half year marriage to buy stocks was a gift and the stocks were his separate property; 2) a house in Beverly Hills and a ranch owned by Wife at the time of marriage were community property and 3) he had an interest in certain automobiles, a statue and several paintings he had taken from Wife's house. The trial court found all of the above mentioned property to be Wife's separate property and ordered Husband to return to Wife all objects he had taken, and also determined that the sum of

$100,000 loaned to Husband to purchase stocks, was a loan and that the stocks were Wife's separate property. We affirmed the judgment (Civil No. 39980).

The record at bench (in the divorce action also) showed that Husband had refused to return the property and told Wife on several occasions that if she would let him keep one of the cars and give him various sums of money, he would not attempt to see her or the baby. Otherwise, he would continue court action regarding the property and the child.

On September 3, 1971, three months after the interlocutory judgment above referred to, Husband filed an Order to Show Cause for expanded visitation rights and to permit custody of Jonathan on certain days. Wife, on September 27, 1971, countered with Order to Show Cause that Husband be found in contempt of court for violating his rights provided in the June Judgment and on December 30, 1971, Wife filed another Order to Show Cause that Husband be found in contempt for further violations of the judgment visitation rights and requested that Husband's visitation rights be terminated.

The consolidated orders to show cause were heard in March 1972. The trial court denied husband's request for modification of visitation rights, found all the facts alleged by wife in the averments of her two several O.S.C.'s to be true and adjuged husband to be in contempt for wilfully failing to comply with the visitation provisions of the Interlocutory Judgment and terminated Husband's visitation rights as provided in the Interlocutory Judgment.

This appeal is from the orders denying husband's Order to Show Cause requesting increased visitation rights and granting Wife's Order to Show Cause of December 30, 1971, both in the matter of finding Husband in contempt and in terminating his visitation rights.[1]

1. Since no appeal lies from an order made in a contempt proceeding, the purported appeal relative to the issue of contempt is dismissed. (Devine v. Devine, 213 Cal.App.2d 549, 552.)

Appellant contends that the court abused its discretion. The court, in pertinent part, made the following findings:

" * * * that Respondent's Order to Show Cause in Re Modification of Interlocutory Judgment re Visitation Rights Concerning Minor Child filed by him on September 3, 1971, was not filed in good faith in that he exercised his visitation right to see the minor child of the parties hereto on June 13, 1971, for a period of thirty-five minutes and no more, instead of the five hours allotted to him by the Court; and in that he failed to exercise his visitation right to see said minor child on July 11, 1971, without notifying Petitioner in any manner whatsoever at any time prior to said date that he did not intend to exercise said right of visitation; and in that he failed to exercise his visitation right to see said minor child on August 8, 1971, without notifying Petitioner in any manner whatsoever at any time prior to said date that he did not intend to exercise said right of visitation.

" * * * that with respect to the foregoing visitation on June 13, and Respondent's failure to exercise his right of visitation on July 11 and August 8, 1971, and his failure to notify Petitioner thereof, as required by the Interlocutory Judgment of Dissolution of Marriage of the parties entered June 15, 1971, Respondent was in contempt of Court and in an attitude of contempt of the Orders of this Court.

" * * * that it is detrimental to the best interests and welfare of said minor child, JONATHAN DAVID BARON, to grant Respondent's request for increased visitation rights of said minor child in that the Court specifically finds that Respondent is unable to tell the truth and is a pathological liar, that he is dishonest, as demonstrated by his actions since the trial in failing to comply with the Interlocutory Judgment of Dissolution entered June 15, 1971, and in that he has used and is using the child as a pawn to get money from the Petitioner.

"For each and all of the foregoing reasons and findings hereinabove made, Respondent's Order to Show Cause in Re Modification of his Visitation Rights with said Minor Child filed September 3, 1971, is hereby ordered denied; IT IS FURTHER ORDERED AND ADJUDGED that Petitioner's Order to Show Cause in Re Modification filed December 30, 1971, seeking termination of Respondent's visitation rights with said minor child is hereby granted forthwith for each and all of the reasons and findings hereinabove made in denying Respondent's Order to Show cause in Re Modification of his Visitation Rights with said Minor Child filed September 3, 1971."

Trial courts have "very extensive discretion" in the matter of terminating child visitation rights and the conclusion

arrived at by the trial court will not be set aside unless the record disclosed a clear abuse of discretion. (Friedland v. Friedland, 174 Cal.App.2d 874, 879; see also Messer v. Messer, 259 Cal.App.2d 507, 510.)

The record discloses substantial evidence to support the trial court's findings and conclusions. On June 13, 1971, the first visitation day, although permitted five hours, Husband spent 35 minutes. On July 11 and August 8, the next two visitation dates, Husband not only made no visits but contrary to the express terms of his right of visitation, did not inform Wife on or before those dates that he did not intend to exercise his rights of visitation. In addition, Husband aggravated the situation by his claim that he did visit the child in August. The evidence was to the contrary. On September 8, 1971, Husband exercised his right of visitation but contrary to the terms of the judgment, returned the child at 7:30 P.M. On October 10, Husband insisted upon his right despite the fact that Wife told him the boy was ill, but returned the child an hour later after verifying the illness with a doctor. On December 24, not a scheduled visitation day, but pursuant to an arrangement with Wife, Husband picked up the boy at 3:30 P.M. and when he returned with the child at 6:00 P.M., he told Wife she was lucky he brought

the child home at all. On December 26, 1971, Husband came to Wife's house at 10:00 A.M. and insisted it was his day to visit the child. When Wife stated the next visitation day was not for more than two weeks, Husband forcibly took the boy, who was still in his pajamas, out of the house, bringing him back a short time later. Instances could be added indicating that Husband did not comply with the Interlocutory Judgment and that the trial court did not abuse its discretion in terminating husband's visitation rights, and specifically that husband was using the child three years old at the time as a pawn, to further his own interests and that it was in the best interests of the child that husband's rights be terminated. There was no abuse of discretion. (Friedland v. Friedland, 174 Cal.App.2d 874, 880; see also Coto v. Coto, 52 Cal.2d 118, 123.)

The judgment is affirmed.

NOT FOR PUBLICATION.

ROTH, P.J.

We concur:

FLEMING, J.

COMPTON, J.

EXHIBIT "B"

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Court of Appeal
SECOND DISTRICT

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LOS ANGELES, CALIF. 90012

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Marvin M. Mitcholson

1809 Avenue of the Stars #825

Los Angeles 90067, *California*

Los A[illegible] [illegible] July 31, 1973

TITLE { [illegible]ron vs. Superior Court, L.A. Co. } No. 42594

[illegible]:

Petition for writ of certiorari denoed.

CLAY ROBBINS, Clerk

[illegible]

EXHIBIT "C"

C

[illegible] No. [illegible]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FILED

[illegible] 19[illegible]

G. E. BISHEL, Clerk

S. F. Deputy

[illegible]

v.

[illegible] COURT, COUNTY OF [illegible]

The above entitled proceeding is transferred to the Court of [illegible], Second District.

[illegible]

[illegible]

Chief Justice

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MICHAEL RODAK, JR.

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Real Party in Interest.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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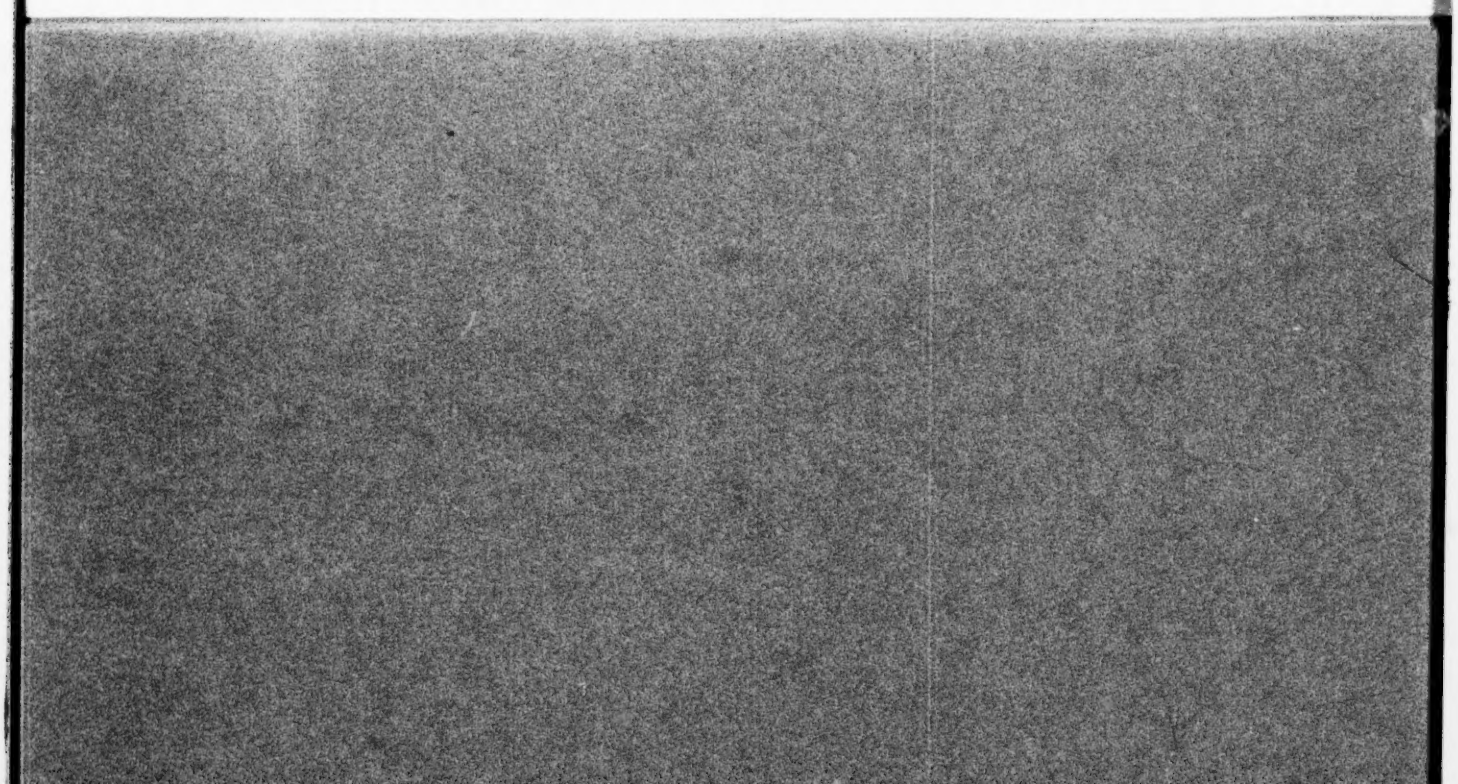

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REPLY TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The record in this case speaks for itself. This matter arises out of the same

action wherein Petitioner has previously filed a Petition for Writ of Certiorari entitled "ANTHONY BARON, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, CLARE BARON, Real Party in Interest" in the Supreme Court of the United States, October Term, 1973, No. 73-281, wherein this Honorable Court denied said Petition for Writ of Certiorari on October 9, 1973.

We respectfully submit that a review of this Petition and of the record in this case reveals no constitutional question of sufficient substance for review by this Honorable Court. We further respectfully submit that this Petition for Writ of Certiorari has even less merit than the previous Petition for Writ of Certiorari which this Honorable Court denied.

WHEREFORE, we respectfully pray that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SINCE 1888

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